

Running Out of Time

This past May, the Attorneys General of Maryland, Virginia, Delaware, and the District of Columbia as well as the Chesapeake Bay Foundation on behalf of several partners filed notices of intent to sue the US Environmental Protection Agency (EPA) for its failure to require Pennsylvania and New York to develop Watershed Implementation Plans (WIPs) that would achieve the Bay's water quality restoration goals by the 2025 deadline. These goals were established by the six Chesapeake Bay watershed states and the District of Columbia (collectively, the "jurisdictions"), in conjunction with EPA, through the issuance of a Total Maximum Daily Load (TMDL) in December, 2010, which set the maximum amount of nutrient and sediment pollution allowed to achieve and maintain water quality standards.

Since that time, the jurisdictions have invested billions of dollars in pollution control measures, such as upgrading wastewater treatment plants, installing stormwater management controls, eliminating and upgrading septic systems and implementing agricultural runoff practices. The jurisdictions established two-year milestones and submitted annual progress reports to ensure they stayed on track to meet their pollution reduction targets. EPA's role has been to coordinate this effort, provide technical and financial assistance, and to take federal actions in the event the jurisdictions failed to make sufficient progress. For the last several years, Pennsylvania has consistently failed to achieve its interim targets and is significantly off-track in implementing all necessary pollution control practices to achieve its 2025 reduction goals.

Most recently, EPA has accepted Phase III Watershed Implementation Plans from PA and NY which, by its own admission, are insufficient for achieving the 2025 reduction goals. In doing so, EPA has abdicated its responsibility under the federal Clean Water Act. EPA Administrator Andrew Wheeler has stated that nothing can be done until the 2025 deadline, which defies all common sense and contradicts federal court decisions on previous challenges to the Bay TMDL. The courts have found the Bay TMDL to be legal, that the use of targets and deadlines to be reasonable and that it serves as a clear example of cooperative federalism. EPA has at its disposal a variety of federal actions or consequences that it can use to encourage jurisdictions to meet their obligations under the TMDL. To date, EPA has failed to fully utilize those federal actions.

Aside from the legal aspects of this effort, there is also an issue of equity and fairness at play. The other jurisdictions in the watershed have made good faith efforts and have invested significant resources in meeting their obligations under the TMDL. These investments have been in addition to those technical and financial resources provided by the federal government. Pennsylvania, in fact, has received more technical and financial assistance from the federal government than any other jurisdiction in the watershed. Pennsylvania's support for this effort, in particular the Pennsylvania General Assembly, however, has been woefully inadequate compared to its proportion of pollution discharges.

The Chesapeake Bay TMDL or Clean Water Blueprint serves as a national and international model for achieving and maintaining water quality standards. The suggestion that this program is aspirational or that it is unenforceable is clearly incorrect. Much has been accomplished to date

under this program. Water quality has improved, long-term data indicates dead zones of low or no dissolved oxygen have been reduced in frequency, duration and intensity, and many fish populations have increased to sustainable levels.

These improvements have occurred while the human population in the watershed has grown from 12.7 million in 1980 to 18.2 million in 2017, a 43 percent increase. This population increase, in turn, has resulted in substantial growth and development of the built environment – more homes and businesses, schools, churches, hospitals, shopping malls, roads, rooftops, and parking lots and less green space, all of which have negative impacts on the environment.

Under the federal Clean Water Act, EPA has responsibility for coordinating and overseeing the Chesapeake Bay TMDL. EPA has an obligation to ensure Bay watershed jurisdictions develop and implement pollution reduction plans that are sufficient to achieve water quality standards. We are in the final third of the TMDL implementation timeline. EPA has the authority, tools and responsibility to take action when states fall short in meeting their pollution reduction targets. Regrettably, it appears the only option that remains to compel EPA to meet its responsibilities under the Clean Water Act is litigation. We cannot afford to allow this effort to fail. Too much has been invested. The health and economic vitality of this region depends on it.

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